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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARISA NICOLE SIVESIND,

Defendant and Appellant.

F057272

(Super. Ct. No. BF126244A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, and Louis M. Vasquez, Deputy Attorney General, for Plaintiff and Respondent.

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*Before Vartabedian, A.P.J., Cornell, J., and Poochigian, J.

Pursuant to a plea agreement, appellant Marisa Nicole Sivesind pled no contest to committing petty theft after having suffered a prior conviction of a theft-related offense (Pen. Code, § 666).¹ The court stayed imposition of sentence; placed appellant on three years' probation; ordered that she serve the first 270 days of her probationary period, less presentence custody credit of nine days, in county jail; and ordered that she complete a residential drug and alcohol treatment program (program). The court also stated it would allow appellant to be released from jail to a program after serving 90 days, and made various monetary orders, including that appellant pay \$40.00 per month in probation supervision costs, beginning on the thirtieth day following her release from custody.²

On appeal, appellant contends (1) the court failed to comply with statutorily mandated procedures in imposing the probation costs order, and (2) the court's implied finding that appellant had the ability to pay the costs of probation supervision was not supported by substantial evidence. We will reverse the probation costs order and remand for further proceedings.

DISCUSSION

Section 1203.1b provides for the following: A defendant who is granted probation and is financially able may be ordered to pay the costs of probation supervision and the costs for preparation of the probation report. "The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs." (§ 1203.1b, subd. (a).) The probation officer must make a determination of the defendant's ability to pay, taking into account any fines, assessments and restitution the defendant is ordered to pay. The probation officer is required to inform the defendant

¹ All statutory references are to the Penal Code.

² We refer to this order as the probation costs order.

that he or she is entitled to a hearing at which the court shall make a determination of the defendant's ability to pay and the payment amount. "The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." (§ 1203.1b, subd. (a).) If the defendant fails to waive the right, the probation officer must refer the matter to the court to schedule, and the court must conduct, an evidentiary hearing to determine the amount of payment and the manner in which the payments shall be made. (§ 1203.1b, subd. (b).) "The court shall order the defendant to pay the reasonable costs if it determines the defendant has the ability to pay those costs" (*Ibid.*)

Appellant argues, and the People do not dispute, that, in violation of section 1203.1b, (1) the court failed to order appellant to appear before the probation officer for an inquiry into appellant's ability to pay probation supervision costs; (2) the probation officer failed to inform appellant of her right to a hearing on the ability-to-pay issue; and (3) the court determined appellant had the ability to pay probation supervision costs and made the probation costs order without conducting a hearing, even though appellant did not waive her right to a hearing.

However, there is also no dispute that appellant did not object at sentencing to the probation costs order. The People argue that as a result of her failure to object, appellant forfeited her right to challenge on appeal the failure of the court and the probation officer to comply with the procedural requirements of section 1203.1b, and her claim that the probation costs order was not supported by substantial evidence.

While we assume that the People's forfeiture claim is meritorious, this court retains the discretion to reach the merits of appellant's claims. In *People v. Williams* (1998) 17 Cal.4th 148, the state raised a claim on appeal it had failed to raise in the trial court. Before the Supreme Court, the defendant argued that the court of appeal had erred in undertaking to review of that claim. In rejecting this argument, our high court stated:

“Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to ‘prevent[]’ or ‘correct[]’ the claimed error in the trial court [citation] does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. [Citations.] Indeed, it has the authority to do so. [Citation.] True, it is in fact barred when the issue involves the admission [citation] or exclusion [citation] of evidence. Such, of course, is not the case here. Therefore, it is free to act in the matter. [Citation.] Whether or not it should do so is entrusted to its discretion. [Citation.]” (*Id.* at pg. 161, fn. 6.) As we explain below, under the unusual circumstances presented here, we will exercise our discretion and address appellant’s procedural claim.

On January 27, 2009, the same day appellant entered her no contest plea, she executed an “ADVISEMENT OF RIGHTS, WAIVER, AND PLEA FORM FOR FELONIES” (plea waiver form) in which she indicated, by initialing a statement on the form, her agreement with following: “... I understand that [if the court grants probation] I will be required to pay \$40.00 per month to probation for supervision cost and, depending on my ability to pay, pay for the cost of any program I am placed into during my probation.”

Thus, appellant was advised prior to her plea that if placed on probation she would be required to pay (1) \$40 per month in probation supervision costs and (2), “*depending on [her] ability to pay,*” the cost of any drug and alcohol treatment program in which she was placed. (*Italics added.*) The obvious implication of the placement of the “ability to pay” language--referring to the program costs but *not* to probation supervision costs--was that the question of her ability to pay was not a relevant factor in the court’s determination of whether to impose the probation costs order. Such advice was, of

course, wrong, despite the fact that the plea waiver form appears to be an official court form.

Given that appellant was incorrectly advised that she could be ordered to pay probation supervision costs regardless of her ability to pay such costs, and that her claim that the probation costs order was imposed in violation of statutory procedural requirements directly related to her right to a determination of her ability to pay, we deem it appropriate to reach the merits of her procedural claim. And as demonstrated above, that claim has merit: In violation of section 1203.1b, (1) the court failed to order appellant to appear before the probation officer for an inquiry into appellant's ability to pay probation supervision costs; (2) the probation officer failed to inform appellant of her right to a hearing on the ability-to-pay issue; and (3) the court made the probation costs order without conducting an evidentiary hearing, even though appellant did not waive her right to a hearing.

The People argue that regardless of the merits of appellant's challenge to the probation costs order, any error was harmless because, the People assert, appellant "cannot show a reasonable probability that she would have obtained a more favorable result had the proper procedure been followed." In support of this contention, the People note that the probation officer stated in the presentence report that appellant, prior to her arrest, used \$100 worth of methamphetamine daily, and that appellant "is youthful and capable of obtaining employment upon release." However, whatever the strength of any inference of ability to pay that might arise from these factors, given that the error complained of deprived appellant of a hearing on the issue, at which she would have had the opportunity to present evidence, we conclude the proper disposition is reversal of the probation costs order, and remand for proceedings in compliance with section 1203.1b.

(§ 1260 [appellate court may reverse an order and “if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances”].)³

DISPOSITION

The probation costs order is reversed and the matter remanded for proceedings in compliance with section 1203.1b.

³ Because we reverse on the basis discussed we need not reach appellant’s argument that the probation costs order is not supported by substantial evidence.